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No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL G. NEAL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

Petitioner's brief shows that the method for calculating the weight of LSD mixtures is and ought to be the same for statutory sentencing purposes as for guidelines purposes. Respondent argues that the Sentencing Commission never intended its guideline to apply to weight calculations under the statute. (Resp. Br. at 17-24) Respondent also contends the guideline *cannot* apply to the statute because this Court already construed the statute in *Chapman v. United States*, 500 U.S. 453 (1991) (Resp. Br. at 24-37), and the Commission has no further role to play in interpreting the term "mixture or substance". (Resp. Br. at 29-30) Petitioner briefly replies to these arguments.

1. The History of Amendment 488 Shows That the Commentary Did *Not* Disavow Application of Amendment 488 to the Statute, But Merely Proclaimed That the Statute and Guideline Were Consistent

Respondent contends that petitioner "fails at the threshold" (Resp. Br. at 17) because the Sentencing Commission explicitly disavowed any intent to apply amendment 488 to the penalty statute, 21 USC § 841(b). (Resp. Br. at 17-24) Respondent's assertion is inaccurate.

Respondent relies primarily on a passage in the Commission's Commentary, that its "approach does not override the applicability[1] of 'mixture or substance' for purposes of applying any mandatory minimum sentence (*see Chapman*)". (Resp. Br. at 21). A review of the historical development of amendment 488 reveals that *whatever* this passage means[2] it does *not* have the meaning attributed to it by respondent.

Amendment 488 had its genesis in a proposal by the Legislative Service of the Federal Defenders to eliminate *all* carrier weight from LSD sentences. (Resp. Br. at 7, citing 57 Fed. Reg. 62832, 62853 (1992)) The Commission did not ratify this proposal because it was inconsistent with *Chapman*, and instead fashioned a system which incorporates the weight of some of the LSD carrier and thereby conforms to the sentencing statute. As is shown in § 4, *infra*, the 0.4 mg. dose-weight in amendment 488 was the result of elaborate empirical studies by the Commission of the market in LSD and the other drugs penalized in § 841(b)(1)(A) and (B). After careful inquiry and deliberation, the Commission was able to assign a weight for doses of LSD *as they are sold in the market on a carrier*, so as to harmonize penalties in LSD cases amongst themselves and with those for other drugs. It is *this*

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[1] In Commentary accompanying the amendment, itself, the Commission used the more emphatic word "definition" in place of "applicability." (*See*, Resp. Br. at 21 n. 13)

[2] It has been described as "obscure" by at least one appellate judge. *United States v. Kinder*, 64 F.3d 757, 768 (2nd Cir. 1995) (Leval, J., dissenting).

"carrier-weight-inclusive" system – a system which punishes LSD trafficking in the format in which the drug is delivered to consumers – which "does not override 'mixture or substance' " and is consistent with the "market oriented" approach taken by Congress in framing § 841(b)(1)(A) and (B).[3] The Commission's Commentary was not intended to limit the "reach" of the amendment, but rather to *proclaim* that the amendment was consistent with the penalty statute to which the guideline correlates.[4]

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[3] As petitioner argued in his brief (Pet. Br. at 33), this analysis is fortified by the Commission's adoption, simultaneous to amendment 488, of another amendment in which the Commission deleted certain types of precursor materials from its previous definition of 'mixture' in order to square the guidelines with *Chapman*'s "market oriented" rationale. (USSC, *Manual* App. C, Amend. 484 (1994)) While respondent is correct in asserting (Resp. Br. at 24) that this amendment is not directly related to amendment 488, *both* amendments reflect a "mindset" on part of the Commission to harmonize the guidelines with the "market oriented" penalty structure of § 841(b)(1)(A) and (B) rather than to set up a dual scheme of sentencing in drug cases. (*See* Pet. Br. at 33)

[4] As such, respondent's reliance on *Stinson v. United States*, 508 U.S. ___, 113 S.Ct. 1913, 1920 (1993) (Resp. Br. at 17, 21-22) is misplaced. *Stinson* held that Commission Commentary is controlling in interpreting a guideline, *but only if not in conflict with the guideline, itself. Id.* at 1918. As indicated, the guideline was intended to establish a weight calculation method in LSD cases consistent with § 841(b), and the Commentary announces rather than qualifies this. To the degree the Commentary can be interpreted otherwise, it is inconsistent with the guideline and should not be followed.

2. The Powers of the Commission Under the Sentencing Reform Act Survived the Passage of Mandatory Penalty Provisions

Attacking a core premise of petitioner's argument, respondent states that "[n]othing in the Anti-Drug Abuse Act . . . suggests that Congress vested the Commission with the authority to interpret or define the statutory phrase 'mixture or substance'." (Resp. Br. at 27; *see also id.* at 30-31) As appears, this contention cites the wrong statute and thereupon interprets it incorrectly.

The first section of petitioner's brief (Pet. Br. at 20-35) was based on the premise that the Sentencing Commission necessarily interprets phrases in sentencing statutes so as to write sentencing guidelines based on such statutes. Textual interpretation of this sort is neither "legislation" nor a quasi-judicial exercise in "statutory construction" on part of the Commission. Rather, it is an activity implicit in, and necessary to, the Commission's "unusual hybrid . . . structure and authority". *Mistretta v. United States*, 488 U.S. 361, 412 (1989). Specifically, the Sentencing Reform Act directs the Commission to "establish sentencing policies and practices for the Federal criminal justice system" [28 USC § 991(b)(1)], by promulgating guidelines which, *inter alia*, "for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18" [28 USC § 994(b)(1)], and which determine the "appropriate length of . . . a term of imprisonment" [28 USC § 994(a)(1)(B)] by taking into account (amongst other factors) "the grade of offense" [28

USC § 994(c)(1)].[5] As explained by petitioner in his opening brief (Pet. Br. at 20-28) this task simply cannot be accomplished unless the Commission is empowered to look to and interpret penalty statutes so as to ascertain the harm at which they are directed and develop guidelines accordingly.[6] Such interpretations have the force of law because the guidelines predicated on them are *binding* on sentencing courts (Pet. Br. at 20-27; *see*, 18 USC §§ 3553(a)(4), (b),[7] and have the cachet of Congressional approval, since Congress has the power to reject proposed guidelines amendments with which it disagrees. [28 USC § 994(p)]. (Pet. Br. at 28-31). *Dozens* of appellate cases have upheld the authority of the Commission, when interpreting statutes in this manner, to "define" the drug mixtures which are subject to penalty statutes. (*See*, Pet.

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[5] Other sections of the enabling legislation reinforce the foregoing. The Commission is directed to develop new and longer terms of imprisonment for crimes which, in the Commission's opinion, are not punished seriously enough. 28 USC § 994(m). The Commission is also directed to recommend to Congress modification of maximum penalties as appropriate. 28 USC § 994(r).

[6] *See also* 28 USC § 994(c)(2),(3), and (4) [in framing guidelines, Commission is directed to look to the harms occasioned by specific offenses; factors which mitigate or aggravate the commission of specific offenses; and the community view of the gravity of specific offenses in setting penalties].

[7] Section 3553(a)(4) (*see*, Pet. Br. App. 6-7), provides that courts must consider the guidelines in imposing sentences. Section 3553(b) provides in relevant part that "[t]he court *shall* impose a sentence of the kind, and within the range, referred to in subsection (A)(4). . . . " (emph. added). *See also Stinson v. United States, supra*, 113 S.Ct. at 1917; *Burns v. United States*, 501 U.S. 129, 133 (1991).

Br. at 22-23 and fns. 12-14) Amendment 488 is but another instance of this familiar exercise of interpretive authority by the Commission.

Respondent appears to recognize the source and scope of delegation of interpretive authority to the Commission, and *concedes* that the Commission's amended definition of LSD weight applies to offenses involving less than a gram of LSD mixture and even to offenses involving *more* than a gram if the government makes a "substantial assistance" motion under 18 USC § 3553(e). (Resp. Br. at 25 n. 16) However, respondent argues that the presence of mandatory penalty provisions in 21 U.S.C. §§ 841(b)(1)(A) and (B) alters this analysis (unless the government has moved for a § 3553(e) departure). (Resp. Br. at 26-27, 31-32) This is not a logical position. The Commission is vested with interpretive powers by virtue of its *enabling legislation*, not by any specific penalty statute, and the Commission's authority is neither increased nor diminished by a defendant's assistance to the government. The rationale behind cases such as *United States v. Shabazz*, 933 F.2d 1029, 1035 (D.C. Cir.), *cert. den.*, 502 U.S. 964 (1991) (Thomas, J.) is that courts must obey the Commission because its interpretative definitions have the force of law. Nothing in mandatory penalty statutes (or § 3553(e)) alters this analysis – a fact reflected in the decisional law. For example, the Eleventh Circuit has held that the Commission is empowered to define the term "cocaine base" both for guidelines purposes *and* for calculation of eligibility for the mandatory minimum; persons trafficking in cocaine products which the Commission does not recognize as "cocaine base" are exempted from mandatory minimum sentencing under

the statute, despite prior judicial decisions defining such substances as constituting "base" cocaine. *United States v. Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).[8] On similar reasoning, several appellate courts have recognized the Commission's authority to define the phrase "mixture or substance containing a detectable amount of LSD" for *all* sentencing purposes, including ascertainment of eligibility for the mandatory minimum in § 841(b)(1). *United States v. Muschik*, 49 F.3d 512 (9th Cir. 1995), *cert. pending*, No. 95-156[9] *see, United States v. Jordan*, 842 F.Supp. 1031 (M.D. Tenn. 1994); *cf. also United States v. Turner*, 59 F.3d 481 (4th Cir. 1995).[10]

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[8] The court described the promulgation and ultimate acceptance by Congress of the new definition of "cocaine base" as amounting to "subsequent Congressional action." *United States v. Munoz-Realpe, supra*, 21 F.3d at 377.

[9] "[A] refinement of the sentencing scheme through the action of the Commission, with the knowledge and consent of Congress, is an expected and necessary element of the process contemplated by the present sentencing scheme. . . . The Commission performed its congressionally delegated role by amending § 2D1.1 in light of *Chapman*. Congress did not challenge the amendment. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized." *Id.* at 517.

[10] The panel of judges in *United States v. Ingram*, 1995 WL 581279 [67 F.3d 126] (6th Cir. 1995) found *Muschik*'s reasoning to be persuasive, although it was precluded by contrary circuit precedent from articulating an affirmative rule harmonizing amendment 488 with the statute; the Court thought "it would not be improper for us to suggest that this Court reconsider" its earlier decision. 1995 WL 581279 at 4.

In fact, mandatory penalty provisions and the guidelines have coexisted from the outset. To the very report on which respondent relies to illustrate the collision between the two approaches, [(Resp. Br. at 26, citing USSC *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991)], the Commission appended a list of 98 mandatory minimum provisions, a *majority* of which (56) were in existence at or before the passage of the Sentencing Reform Act which created the Commission. *Id.* at App. A. As petitioner indicated in his brief (Pet. Br. at 24), Congress intended the Commission to oversee minimum as well as "open" sentencing provisions. Petitioner is *not* "wide of the mark" (Resp. Br. at 27) in contending that the Commission retains authority to fulfill its mandate even where a mandatory sentencing provision sets the outer limits of imprisonment. "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. ___, 112 S.Ct. 1329, 1334 (1992).[11]

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[11] There are, of course, philosophical tensions between the refinements of the guidelines approach and the "tariff-like" "cliffs" imposed under mandatory minimums. *See*, USSC: "Mandatory Minimums," *supra*, at 26, 28, 30-31; USSC: "Remarks of Chief Justice William H. Rehnquist National Symposium on Drugs and Violence in America, June 18, 1993" at 9 (1993). However, it does not follow that the specific guideline at issue here is necessarily inconsistent with any penalty statute to which it relates.

Respondent tries to fortify its position with case citations (Resp. Br. at 27 ¶ 2) but only one cited case (*United States v. Granderson*, 510 U.S. ___, 114 S.Ct. 1259 (1994)) even *mentions* the Commission or its guidelines. It is odd for respondent to rely on *Granderson*, since that decision can be read as *expanding* the Commission's authority by giving it *de facto* power to *set* a mandatory penalty. The issue in *Granderson* was the length of the minimum term of imprisonment which must be imposed when probation is revoked under certain circumstances. The relevant statute provided for a minimum penalty of "one-third of the original sentence", which the Government interpreted to mean a third of the period of probation (in Granderson's case, a third of five years and thus more than his maximum "exposure" for the underlying offense). This Court held that the "original sentence" is the normal *guidelines range* for the underlying offense. Since the guidelines range is set by the Commission, this means that the mandatory minimum sentence in Granderson's case was, in effect, set by the Commission. Whatever significance *Granderson* has, it hardly stands for a limitation on the authority or prestige of the Commission.[12]

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[12] Also misplaced is respondent's reliance on *Smith v. United States*, 508 U.S. ___, 113 S.Ct. 2050, 2055 (1993) for the proposition that guidelines are never relevant in construing criminal statutes. In *Smith*, this Court rejected as "dubious . . . in the present context" an attempt by a defendant to apply an unrelated guideline to settle whether trading a gun for drugs constitutes "use" of a gun in a drug crime in violation of 18 USC § 924(c). This Court did *not* hold that guidelines predicated on actual statutes are irrelevant in construing those statutes; to the contrary, in *Chapman v. United States*, *supra*, 500 U.S. at 462, this

Repeals by implication are not favored. (Pet. Br. at 24-25) The burden would seem to be on respondent to *demonstrate* its proposition that mandatory minimum statutes effected a *de facto* repeal of core aspects of the Sentencing Reform Act. Respondent has failed in this task.

3. Amendment 488 Reflects the Congressionally-Sanctioned Interpretation of "Mixture or Substance" in LSD Cases

Petitioner argued (Pet. Br. at 28-31) that Congress' failure to utilize 28 USC § 994(p) to block amendment 488 is of significance in that it shows Congressional "approval" of the sentencing practice promulgated by the amendment.

(A) *There is No "Presentment Clause" Problem*

Respondent counters suggests that such an inference is problematic under the "presentment clause" [art. I § 7] of the Constitution. (Resp. Br. at 38, citing *I.N.S. v. Chadda*, 462 U.S. 919 (1983). However, the "presentment clause" applies only to *legislation*. Amendment 488 is not *legislation*. It is a "sentencing practice", [28 USC § 991(b)(1)], set up by the Commission pursuant to explicitly delegated authority to set up such practices. The Commission did not purport to repeal § 841(b)(1)(A) and (B). It merely modified the "sentencing practice" as to calculation of mixture weight under the statute. It did so

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Court stated that it looked to the guidelines as part of its task of construing § 841(b).

without "overriding" the statutory command that drug weights be calculated in mixed, rather than pure, form. Notwithstanding the amendment, ten grams of LSD mixture *still* fetches a ten-year sentence, and the Drug Quantity Table still correlates with § 841(b)(1)(A) and (B). There is therefore no legislation at issue in this record, and hence no "presentment" problem.

(B) *Congress Acquiesced in the Commission's Interpretation of "Mixture or Substance"*

Congress' silence is, however, *significant*. It is likely that Congress viewed the amended guideline and § 841(b)(1)(A) and (B) as harmonious approaches to the same problem using identical language. *United States v. Munoz-Realpe, supra*, 21 F.3d at 378, citing *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) [use of term in FTC Act and FTC practice controls definition of parallel term in Clayton Act]; *Oscar-Meyer, Co. v. Evans*, 441 U.S. 750, 755-756 (1979) [same: *haec verba* provisions in Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1967. This analysis is particularly compelling with regard to sentencing, since the avowed purpose of the Sentencing Reform Act was creation of a coherent sentencing structure. Thus when, as here, the Commission interprets a term common to the guidelines and the statute, and "Congress itself thought the Guidelines were not inconsistent enough with its mandate . . . so as to require change," [*United States v. Leuddeke*, 908 F.2d 230, 233 (7th Cir. 1990)], it is reasonable to conclude that Congress is in accord with the Commission's interpretation of the statutory phrase. *See generally,*

Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941); *United States v. Munoz-Realpe, supra*, 21 F.3d at 977.

Respondent counters that Congress cannot be said to have *agreed* with the interpretation of "mixture or substance" in amendment 488, but only 'went along' with the amendment to the extent "it concerns sentencing *under the Guidelines*" (Resp. Br. at 39, emphasis in original) This cannot be correct. The guidelines *implement* sentencing statutes. The Commission lacks authority to pass a guideline which explicitly violates a statute. (*See*, Resp. Br. at 26) Nor would Congress tolerate the Commission in doing so. Using its reserved authority under 28 USC § 994(p), Congress would *block* such a guideline, as it recently did in response to the Commission's attempt to change the penalty for "crack" cocaine in a manner inconsistent with § 841. (*See* S.R. 1254, Pub. L. 104-38, 104th Cong. 1st Sess., 109 Stat. 334, 58 Cr.L. 1087, 1109 (Oct. 30, 1995)). That Congress did not do so here is evidence that Congress viewed amendment 488 as consistent with the penalty statute to which it relates.

4. The Commission *Does* Have a Role in Interpreting The Technical Phrase "Mixture or Substance Containing . . . LSD", and This Court Should Pay Heed to the Commission's Voice Because Amendment 488 Was Based on Empirical Studies of High Quality

Petitioner contends that amendment 488 was the work of an expert agency on a technical issue falling within the ambit of its expertise. Respondent counters that "mixture or substance" is not a "technical term" but rather is a phrase limited to its plain meaning as ascertained in *Chapman, supra*, 500 U.S. 453. (Resp. Br. at 29-30)

Respondent misconstrues the "technical" field over which the Sentencing Commission is expert. The Commission is not a board of pharmacists. Its expertise lies in the field of *sentencing*. It was chartered to develop a *proportionate* sentencing scheme on the basis of empirical data. This is precisely what it did with amendment 488. In fact, this Court looked to the Commission for technical guidance before deciding *Chapman* on an "ordinary meaning" basis.[13] *Id.* 500 U.S. at 462. This was entirely appropriate, since "mixture or substance" may accurately be described as a "technical" term in two ways.

First, the phrase may refer to the "technology" of drug delivery – not so much in the sense of "scientific conclusion[s] about the actual dispersion of LSD crystals among carrier media," (Resp. Br. at 29-30), as in the sense of the *social* science of the economics of drug packaging and trafficking. As petitioner pointed out in § III of his brief (Pet. Br. at 45-49), *Chapman* left at least two such technical questions unanswered in its wake.

Second, the phrase is "technical" with respect to developing *proportionate penalties for like crimes*. This is the *core* task of the Commission. 28 USC §§ 991(b)(1)(B), 994(f) Although respondent apparently feels it is not an area for "scientific" inquiry, the guidelines necessarily "begin[ ] with, and build[ ] upon, empirical data", (USSG *Manual* ch. 1 pt. A § 3 ¶ 15), in this very area.

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[13] At the time of *Chapman*, the Commission had not yet spoken to the issue. Empirical data showing disproportionate sentencing in LSD cases in the wake of *Chapman* was not, of course, available to the Commission until after *Chapman* was decided.

The Commission undertook extensive factfinding in *both* areas before promulgating amendment 488. Specifically, the Commission had before it a sentencing record from *every* Federal case, including all drug cases in general and all LSD cases in particular. 28 USC § 994(w); *Mistretta, supra,* 488 U.S. at 369-370. The Commission also had a treasury of sentencing data which it was required to collect under its statutory scheme, and which it *had* been collecting over the years. *See generally,* 28 USC §§ 995(a)(8), (9), (12), (13), (14), (15); (USSG *Manual* ch. 1 pt. A § 5). To this data base, the Commission added extensive written and oral testimony on the proposed LSD amendment. The "public comment" files of the Commission reflect considerable input from attorneys and ordinary citizens on LSD weight and its impact on sentencing.[14] This written comment was followed by a full day of testimony devoted to the merits of amendment 488 and several other proposals.

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[14] *E.g.*, Tr. USSC Hearings 3/22/1993 at 173-178 (testimony of Denise Helou incorporating study of 120 LSD offenders and sentences showing gross sentencing disparity in LSD sentences); *Id.* at 7-18, 165-170, 178-179, 180-182, 183-186 (testimony from family members); Letters from FPD office in San Francisco; Thomas Jones, Esq.; Klinger, Robinson, et al.; Richard Marshall, P.C.; McCormick & Christoph, P.C.; Karen Wilkes, Esq.; Richard Besser; William Burke; Virginia Conroy; Rachel Rose; Ernie Voegtlin; Citizens for Equal Justice (authored by the undersigned); Citizens United for Rehabilitation of Errants; and Families Against Mandatory Minimums; Geneva Christian Church. No doubt the Commission also drew on empirical knowledge about PCP penalties

After these hearings, the Commissioners deliberated for over a month before unanimously agreeing to a sentencing rule which harmonized the circumstances of numerous individual cases into a uniform and proportionate sentencing norm. Commentary accompanying amendment 488 makes it clear that the Commission derived its .4 mg per dose definition of "mixture" from extensive cross-comparison of penalties in LSD cases amongst themselves and with those for PCP or heroin, and then ranking the penalty tiers according to social harm. The formulation of a guidelines amendment based on this data was, itself, the result of empirical study. The initial proposal, "amendment 50" as published in the Federal Register, was to weigh each dose of LSD at 0.05 mg., a figure supplied by the DEA. After the hearings, the Commission substituted amendment 50(A), which contained two variant dose-weights (0.05 mg. and 0.08 mg.) derived from a DEA chart of LSD potency during the years 1986-1991, [*see* DEA, "LSD: A Situation Report" at 49 (1992)]. According to a memorandum from the Commission's counsel, the .08 figure insured a greater equivalency between *street prices* of equivalent amounts of LSD and the other street drugs listed in § 841(b)(1)(A) and (B). Meanwhile, a group of House Republicans wrote the Commission complaining that elimination of *all* carrier weight would be inconsistent with § 841(b) as interpreted in *Chapman*. (Letter of Henry Hyde, *et al.* to USSC 4/7/1993 (copy in author's files)). Finally, the Commission submitted a revised amendment 50(A), which ultimately was passed as guidelines amendment 488, which accounted for some but not all of the weight of the blotter paper and equated LSD penalties with those for PCP, and

therefore correlated with the "market" approach of § 841(b)(1)(A) and (B).

This was not a mere "policy judgment[ ], different from those of Congress codified in Section 841(b)"[15] (Resp. Br. at 30) but an empirical study of high quality – the sort of assessment which sentencing judges traditionally undertook in individual cases over the years, but which Congress has now directed be done on a uniform basis by a national Sentencing Commission promulgating normative "sentencing practices" [28 USC § 991(b)(1)] for the judiciary at large. *This* is why Congress created a Commission of judges and sentencing experts, [28 USC § 991(a)], and conferred on it plenary investigatory powers [28 USC § 995(a)(8), (9), (12), (13), (15), (16), (17), (21), (b), (c)]. With amendment 488, the Commission lived up to the best intentions of its creators.

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[15] Reference to "policy judgments" by Congress may be somewhat ironic. At the time it was passed in the Senate, a member referred to § 841(b)(1)(A),(B) as a "sanctimonious election stampede", [132 Cong. Rec. 26441 (9/26/1986) (Sen. Evans)]; another Senator lamented "[v]ery candidly, none of us has had an opportunity to study this enormous package." 132 Cong. Rec. 26462 (9/26/1986) (Sen. Mathias). This is not surprising. "Mandatory minimums . . . are frequently the result of floor amendment to demonstrate emphatically that legislators want to 'get tough on crime'. Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines as a whole." Rehnquist, *Remarks*, *supra*, at 10.

5. *Chapman* Does *Not* Preclude Application of Amendment 488 to Weight Calculation Under § 841

Respondent argues that "[e]ven if the Commission did have a role to play in construing Section 841(b) . . . *stare decisis* requires that the Commission's approach be evaluated for its conformity to governing precedents . . . including *Chapman*." (Resp. Br. at 33) Respondent interprets petitioner's brief as an invitation to overturn *Chapman*. It is not. It is a request that this Court interpret the whole of § 841(b), including aspects touched on in *Chapman* in light of the Commission's expert empirical findings. This request is in keeping with principles of *stare decisis* and sound canons of statutory construction, as appears below.

Although *Chapman* was "generically" a case of statutory interpretation, *this Court was not asked to construe the statute as a whole*, but rather a few isolated words in a lengthy and complicated text. But the gravamen of § 841(b) is not the three simple words "mixture or substance", but rather the establishment of mandatory and uniform penalties for eight common "street" drugs of abuse. Because Congress provided identical penalties based on different quantities of these drugs and because the listed quantities correspond to similar numbers of *doses* of the drugs, [*Chapman, supra*. 500 U.S. at 475, n. 12, (Stevens, J., dissenting); *United States v. Marshall*, 908 F.2d 1312, 1334 (7th Cir. *en banc*) (Posner, J., dissenting), *aff'd sub nom. Chapman, supra*], there is every reason to suppose that Congress viewed these different quantities as being *in pari materia*. Because this Court in *Chapman* was called upon to construe only the phrase "mixture or

substance," it was forced to disregard this aspect of the statute in order to give plain meaning to the isolated text actually before it. But there is no reason to suppose that a genuine construction of the statute, even a "plain meaning" one, ought to ignore so important a portion of the statutory text as the part that says "ten years" and applies that penalty to supposedly proportionate quantities of drugs in "market" form. To the contrary, it is established by the jurisprudence of this Court that a statute is to be construed (albeit "plainly") in accordance with its "language and design . . . *as a whole*." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (emphasis added); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1989). Amendment 488 preserves the "market-oriented" meaning of "mixture or substance" in the context of § 841(b) as a whole. This is not surprising, since the amendment was based on empirical evidence about the actual workings and impact of the statute *as a whole* in hundreds of cases over many years.

Whether or not deference to the Commission's handiwork falls strictly within the ambit of this Court's doctrine in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or within the deference afforded by Courts to the "wise solutions" proffered by the Sentencing Commission, [e.g., *United States v. Irwin*, 2 F.3d 72 (4th Cir.) (Wilkins, J.), *cert. den.*, 114 S.Ct. 1086 (1993) (collecting cases); *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995) (Posner, J.) (non-binding Commission policy statements entitled to "great weight" in light of Commission's expertise on sentencing issues)], this Court should use this case as an opportunity to construe § 841(b) *as a whole* in light of realities uncovered by the

Commission. This may spell the end of "gross weight" punishment in LSD cases, but it will do no violence to principles of *stare decisis*. Construing § 841(b) in light of amendment 488 implements the entirety of Congress' Anti-Drug Act sentencing scheme while leaving the essential holding in *Chapman* intact.

Applying amendment 488 implements Congressional intent in another subject area as well. A decade ago, Congress made the decision that a crisis in the criminal justice system was to be resolved by a unique administrative agency whose members would bring judicial experience, plenary investigatory resources, and flexible rulemaking power to bear on technical sentencing issues. Congress contemplated a *dialogue* between the Commission and the Courts, [*Braxton v. United States*, 500 U.S. 344, 348 (1991)], in which the Commission's expertise would inform the judiciary just as happened here. In promulgating amendment 488 the Commission lived up to the vision of its proponents; it established proportionate sentencing practices, on the basis of thorough empirical data, with an eye towards implementing a penalty statute as a uniform whole. Whether the Commission's lead *must* be followed or merely *should* be followed, the message is clear: this Court should heed the Commission's handiwork and interpret § 841(b)(1) to reflect the realities of the drug markets in a real world.

"It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting). This Court has the rare opportunity to avoid such misfortune here. Section 841(b) should be assessed in light of the

expertise of the Commission entrusted by Congress to inform the Courts precisely as it has done here.

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Respectfully submitted,

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APPENDIX A

Proposed Amend. 50 (57 Fed. Reg. 62832, 62853)

50. *Synopsis of Proposed*

Amendment: This amendment bases the offense levels in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) on the amount of actual LSD involved to eliminate the disparately high offense levels applicable to low-level traffickers in LSD. The dosage quantity of LSD is so small that at present nearly all of the weight used to determine a defendant's punishment comes from the weight of the carrier. Thus, a defendant who has enough pure LSD to produce 65,000 doses has an offense level that is the same as a defendant with blotter paper containing 500 doses of LSD.

Proposed Amendment: The asterisk footnote to subsection (c) of § 2D1.1 is amended by adding after the first paragraph the following new paragraph:

"In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted."

APPENDIX B

Testimony of Denise Helou 3/22/1993
USSC Hg. on Prop. Amend. 50

[p. 173] CHAIRMAN WILKINS: Thank you very much.

We have a panel now of Gene Brown, Faye Flanagan, Douglas Thrasher, Denise Helou and Marlene Miller. Please come around. Do you have one spokesperson, will you all speak, or how do you want to do it?

Well, I hope you will allot your time however you want to, so it suits us fine. Thank you.

MS. HELOU: Hi. My name is Denise Helou and I am here today to present to the Sentencing Commission information that I have collected in the past 6 months about the LSD carrier weight issue. I have collected this information for families against mandatory minimums.

This information has come to me in the form of a survey which I have mailed to over 120 LSD offenders serving time in Federal Prison. My intent in conducting this survey was to show the inequities in sentencing that have been created by the judicial policy of including the carrier-weight of the LSD when determining the total weight of the drug.

The results of the survey have been put into graphs which you all have. LSD is not like most drugs, in that it [p. 174] is sold by doses, not by weight. The value of cocaine, heroin and marijuana is determined by their weight. Six grams of cocaine is worth twice as much as 3 grams of cocaine. With regards to LSD, the drug cannot

be cut to in crease street value. The drug potency remains the same, regardless of what type of carrier is used.

To show how the actual sentence of each offender is not congruous to the weight used, let's begin by describing how there is no correlation between the amount of drug and its weight when the carrier is included. Let's look at our first graph, which charts the amount of LSD on the horizontal axis against the weight of the drug on the vertical axis. This is the graph that is hand-drawn.

The data on this graph represents information from 64 prisoners who responded to the survey. As you can see, the weight of the drug does not increase proportionately with the amount of drug. The graph does not demonstrate any such pattern in drug weights. Look, for example, at offenders who are charged with 1,000 doses. There were 8 altogether, including two pairs of co-defendants. The six separate weights are, in grams, 5.789, 6.53, 8.745, 8.9, 9 and 29. This range includes guidelines 28 through 32.

[p. 175] Some of the other carrier examples are even heavier. Reed Styers, 156-month sentence was severe, because his 8,000 doses were on 160 grams of tablets. Charles Smith was originally convicted for 360 hits on blotter weighing 2.9 grams. At his sentencing hearing, 5 hits on sugar cubes were added to his total weight. Those 5 sugar cubes weighed 11 grams. Those 5 doses raised his guideline level from a 26 to a 32. There is just no connection between the amount of drug and its weight. Likewise, there is no connection between the weight and the sentence.

The second graph attempts to show the disparities in sentencing that occur when the carrier-weight is included by demonstrating the inequities when assigning the initial base offense level.

I limited my study group to first offenders placed in criminal history Category 1, to reduce the variables caused by sentencing procedures. If the sentences were reflective of the drug amounts, the base guideline levels, the guideline set before enhancements and reductions would steadily rise as the weighs increase. This is clearly not the case, as we can see the guideline level jump from 30 to 32, back down to 30 and 28 again, and then do the same for [p. 176] the higher levels. This results in disproportionate sentencing.

Lester Liston had a distribution charge for 2,500 doses which weighed a heavy 33 grams. His 10-year sentence was more than Doug McMillan's 97-month sentence, whose 5,833 doses only weighed 25.84 grams. Michael Gage also received a 97-month sentence for his 1,545 doses, simply because his blotter paper weighed 13.5 grams. Chris Boothe, with only 599 doses, received a 121-month sentence because of heavy blotter paper, which put him in the guideline level of 32.

The lower line charts what the guideline would have been if the dosage equivalency of .05mg per dose is used. The equivalency was set by the Commission and is using cases where there is no actual LSD-2A, a circumstance which only happened once in my study. The figure appears to be fairly accurate for those offenders whose LSD was tested and weighed without the carrier weight.

In the examples of James Wehring, the 7,000 doses he was charged for conspiring to distribute did not exist. As a result, the court had to use the .05mg figure, giving him a guideline of 18. His is the only case in which this method was used to determine a sentence, thus creating even [p. 177] more inequity in the sentencing process.

If such a uniform method, be it a formula or the weight of the actual LSD, were used for all defendants, the courts would not see many of the sentencing problems that exist today. An offender with 599 doses would not receive the same guideline level of 32 as someone who has 5,833 doses. The same applies to a man charged with 2,400 doses and a woman with 17,767, both of whom were placed in level 34.

As it stands today, those with smaller amounts of drugs are often punished more severely than those with larger amounts. LSD sentences are not based on the amount of drug, but, rather, on the weight of the carrier. Using the actual weight of the LSD or an accepted uniform weight results in a fair and sound sentencing structure.

CHAIRMAN WILKINS: Thank you very much.

Anyone else?

COMMISSIONER MAZZONE: How again did James Wehring get down to Level 18? You say there was a conspiracy to distribute 7,000 doses?

MS. HELOU: Right.

COMMISSIONER MAZZONE: And that was not proven or was –

[p. 178] MS. HELOU: No, it was proven, but the government did not have any actual LSD to weigh, since it was a conspiracy charge, so they were forced to use the .05mg equivalency.

COMMISSIONER MAZZONE: I see. There was no paper, there was no physical evidence, no carrier?

MS. HELOU: There was no physical evidence, and there have been other cases where they have been no physical evidence, but they used someone else's drug, someone's connected weight, but in this case they could not do that, so they were forced to use the .05mg.

CHAIRMAN WILKINS: Other questions?

[No response.]

* * *

APPENDIX C

Proposed Amendment 50(A)

Substitute Amendment 50(A)

§ 2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

(c) DRUG QUANTITY TABLE

* * *

In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to [Option A – 0.05 mg] [Option B – 0.08 mg] of LSD for the purposes of the Drug Quantity Table.

APPENDIX D

Commission Discussion Memo on Amendment 50(A)

proposed Amendment 50

Discussion: The attached chart prepared by the Drug Enforcement Administration, titled LSD Potency,[1] shows average potency per dose from 1986-1991. From this chart, the average dose is about 0.05 milligrams of LSD (about 50 micrograms). [Note that the DEA chart is in micrograms, not milligrams.] Most LSD is between 0.02 milligrams (20 micrograms) and 0.08 milligrams (80 micrograms) per dose. Thus, if the Commission decided to weigh only the LSD and not the carrier medium, a weight of 0.05 milligrams per dose would provide a reasonable approximation. In fact, a recent DEA publication states that "the DEA standard dosage unit for LSD is 50 micrograms"[2] [50 micrograms is equal to 0.05 mg]. Use of a standard dosage unit for cases in which the LSD is on a carrier medium will reduce unwarranted disparity due to the weight of the carrier medium and will be simpler to apply than requiring the extraction of LSD from the carrier medium to determine its weight.

Using 0.05 milligams as the weight for each dose of LSD on a carrier medium would mean that offense level 26, for example, would begin at 20,000 doses of LSD (20,000 doses at 0.05mg = 1 gram). The wholesale price estimated by DEA for 20,000 doses of LSD is from $6000 to $80,000.[3] The comparable quantity of heroin at level 26 is 100 gms (wholesale price estimated by DEA to be between $5,000 and $26,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[4] The comparable quantity of cocaine at level 26 is 500 grams (wholesale

price estimated to be between $5,500 and $20,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[5]

A more conservative strategy would be to select 0.08 milligrams as the weight to be used for each dose of LSD on a carrier medium. Selection of 0.08 mg as the appropriate dosage unit would ensure that most LSD cases would have an actual dose than is less than this amount, yet would provide a total weight per dose that is substantially less than the current weight of LSD and blotter paper. At 0.08 mg per dose of LSD, offense level 26 would start at 12,500 doses of LSD (12,500 doses at 0.08 mg each = 1 gm of LSD). The wholesale price estimated by DEA for 12,500 doses of LSD is from $3750 to $50,000.[6] The comparable quantity of heroin at level 26 is 100 gms (wholesale price estimated by DEA to be between $5,000 and $26,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[7] The comparable quantity of cocaine at level 26 is 500 grams (wholesale price estimated by DEA to be between $5,500 and $20,000 at the kilogram level; the price at the 100 gm level would significantly higher).[8]

In the opinion of the Commission's General Counsel, either option appears to have a rational basis and, therefore, should withstand legal challenge. However, of the two options, Option A (0.05mg per dose) appears to have stronger support in the empirical data; therefore, it would appear to be the easier to sustain in the face of possible legal challenge.

Recommendation: Adoption of Substitute Amendment 50(A) is recommended using a weight of [0.05 mg per

dose (Option A)] or [0.08 mg per dose (Option (B))] of LSD when the LSD is on a carrier medium. If the Commission desires to approximate the average actual LSD per dose, the weight of 0.05mg per dose [Option A] should be adopted. If the Commission desires to ensure that its weight per dose is equal to or grater than the actual LSD weight in most cases, a weight per dose of 0.08 mg [Option B] should be selected.

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[1] U.S. Department of Justice, Drug Enforcement Administration, LSD Situation Report (February 1992) at 49.

[2] Id. at 31.

[3] Id. at 48.

[4] U.S. Department of Justice, Drug Enforcement Administration, Illegal Drug Price/Purity Report; United States Calendar year 1988 through September 1991, at 3. Note: Prices quoted above are for the first nine months of 1991.

[5] Id. at 1. Another way to compare LSD with heroin and cocaine is to compare the street prices that will result from a level 26 quantity of each substance. The main reason for comparing street prices is the issue of purity. The purity of LSD does not change as it moves through the distribution chain from a wholesale to a retail level. LSD is virtually pure LSD at the wholesale level and the street level. Correspondingly, the price of LSD does not go through radical changes as it moves through the distribution chain. In contrast, controlled substances such as heroin and cocaine are imported at fairly high purity levels and must be heavily diluted before they can be consumed. They are diluted or "cut" many times as they move down the distribution chain and at the same time there is a rise in price which is not proportional it, but greater than, the value of the actual controlled substance in the mixture compared to its value at the previous level. To control for the way that controlled substances move through the distribution chain, looking at the end price, the "street price," of the various

substances would be appropriate. Making the comparison by using street level prices produces the following results:

Street Prices for Offense Level 26 Quantities

Drug	Price
LSD (1 gm; 0.05 mg per dose)	between $20,000 and $200,000
Heroin (100 gm)	between $94,000 and $140,000*
Cocaine (100 gm)	between $31,000 and $136,000.

* The price for heroin is based on price per gram and provides a low estimate of actual street value of heroin because heroin is not sold on the gram level on the street. Street level heroin sales very greatly in weight from bags of .03 grams to .10 grams and purities ranging from as low as 10% to about 40%. Because of this great fluctuation and range in the heroin market at street level, DEA was does not provide street level prices.

[6] Id. at 48.

[7] Id. at 3.

[8] Id. p. 1.

APPENDIX E

Proposed Amendment 50(B)

Substitute Amendment 50(B)

§ 2D1.1 *Unlawful Manufacturing, Importing, Exporting, Trafficking, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

Commentary

* * *

Application Notes:

* * *

16. *Where the court finds that inclusion of the particular weight of the carrier medium in an LSD case (e.g., a sugar cube rather than blotter paper) increases the total weight and therefore the sentence exposure, and the increase is unrelated to the seriousness of the defendant's offense, a downward departure may be warranted to an offense level more appropriate to the seriousness of the offense (assuming a more typical carrier medium). A departure on this basis is not warranted, however, if the defendant has any prior criminal record counted under § 4A1.1(a), (b), or (c) or if anyone involved in the instant offense possessed a weapon.*

APPENDIX F

Substitute Amendment 50(A) (Amendment 488)

Substitute Amendment 50(A) [Revised 4/19/93]

§ 2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

(c) DRUG QUANTITY TABLE

* * *

In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to [0.4]mg of LSD for the purposes of the Drug Quantity Table.

Commentary

* * *

Application Notes:

* * *

16. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits" per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.

* * *

Background:

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier would produce unwarranted disparity along offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of [0.4] milligrams for purposes of determining the base offense level.

The dosage weight selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of .05 milligrams (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Since LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier recognizes (A) that offense levels for most other illicit drugs are based on the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium on which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level per dose of LSD and a carrier with that for the same number of doses of actual PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Note that treating LSD on a carrier as weighing 0.5 milligrams per dose would produce offense levels equivalent to those for PCP, which has a weight of 5.0 milligrams per dose.)

Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of any mandatory minimum sentence (see § 5G1.1; Chapman v. United States, supra.).